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In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF OREGON, PETITIONER

v.

BRUCE ALAN KENNEDY

ON WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial of a defendant who successfully moves for a mistrial on the basis of prosecutorial error or misconduct that was not intended to provoke the mistrial request.

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the effect of the Double Jeopardy Clause when a criminal defendant successfully moves for a mistrial on the ground of prosecutorial or judicial error or misconduct. Although this is a state prosecution, the question presented here arises frequently in federal cases and has divided the federal courts of appeals. Accordingly, the United States has a direct and significant interest in the standard applicable to such cases.

STATEMENT

Respondent was tried in the Circuit Court of the State of Oregon (Multnomah County) on a charge of theft of an oriental rug. The State called Otto Ewaldsen, as an expert witness to identify the rug in question and to estimate its value (Tr. on Appeal 21-32). On cross-examination, defense counsel attempted to establish Ewaldsen's bias against respondent by eliciting the fact that Ewaldsen had once filed a criminal complaint against him (*id.* at 34). Ewaldsen eventually acknowledged that he had filed a complaint charging respondent with fraudulent advertising but that the District Attorney's office had taken no formal action on it (*id.* at 34-35).

On redirect examination, the prosecutor asked Ewaldsen why he had filed the complaint, but the trial judge sustained a series of objections to that line of inquiry (*id.* at 62-66). The Oregon Court of Appeals later stated (Pet. App. 13) that "[t]he objections were not well taken and the judge's rulings were probably wrong." In an answer stricken by the trial judge, Ewaldsen stated that he had filed the complaint because he believed that respondent was guilty of false advertising (Tr. on Appeal at 65). Thwarted in her effort to elicit this damaging testimony by permissible means, the prosecutor then asked (*id.* at 67):

> Q: Have you ever done business with the Kennedys?
>
> A: No, I have not.
>
> Q: Is that because he is a crook?

The court granted respondent's motion for a mistrial, stating (*id.* at 70-71):

> * * * I think your question is—in an effort to rehabilitate him, you certainly are entitled to get some of that in but I think your question went beyond that. Your question, I feel, Miss Johnson [the prosecutor], was highly prejudicial; got right to the heart of it and that it was just uncalled for. I think you went one line beyond, and what you're telling the jury by your question is just exactly what the issue is right here, that he pulled a fast deal. * * * [S]o I think the effect of that is to put in the jury's mind that the man's a crook and therefore he must have done this whether he's guilty of the charge or not.

When the case came on for retrial, respondent moved to dismiss the charges on double jeopardy grounds. At the evidentiary hearing on the motion to dismiss, which was conducted by a second judge, the prosecutor testified that she had asked the fatal question in good faith and had vigorously objected to the request for a mistrial. She noted that she even followed the trial judge into his chambers to ask that he reconsider his ruling (March 17, 1980 Tr. 11, 12, 19).

The motion to dismiss was denied. The judge found that the prosecutor's question, although "improper as put," was not an "intentional impropriety" and was not asked in "bad faith" (March 17, 1980 Tr. 22-23). The judge stated: "[I]t seems apparent that the objectionable statement was made in the course of an attempt to clarify matters which had been brought out on cross-examination, and this, of course, is a proper function of redirect examination" (*id.* at 22). Distinguishing *United States* v. *Kessler*, 530 F.2d 1246 (5th Cir. 1976), upon which respondent relied, the court found no "prosecutorial overreaching," "gross negligence," or "intentional misconduct" and therefore held that double jeopardy principles did not bar retrial (*id.* at 23).

The Oregon Court of Appeals reversed, holding that the prosecutor's question constituted "overreaching." The court elaborated:

> The comment occurred during the redirect examination of a key witness. The prosecutor's express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, we think the prosecutor is charged with the knowledge that the comment—which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought—was certain to interfere with the trial process. Defendant then was faced with a Hobson's choice—either to accept a necessarily prejudiced jury, or to move for a mistrial and face the process of being retried at a later time. There will be many circumstances in which the decision, in the face of this dilemma, to seek a mistrial will be deemed the equivalent of a waiver of a defendant's prior jeopardy rights. See *United States* v. *Jorn*, *supra*, 400 U.S. at 485. However, this case of flagrant over-reaching lies outside that general rule.

Pet. App. 14-15. The Oregon Supreme Court denied the State's petition for review.

SUMMARY OF ARGUMENT

1. Our adversary system of criminal justice encourages both prosecutors and defense counsel to apply their skills and their efforts toward the interests of their respective clients. While both operate within prescribed limits of appropriate conduct, and while the prosecutor has a special duty to temper the zeal of advocacy with a careful regard for fair treatment of the accused, it is a fact of legal life, duly recorded in innumerable reported decisions, that from time to time prosecutors exceed the bounds of proper advocacy and inject into the criminal trial errors that so prejudice the defendant's interests as to render any ensuing conviction invalid. Traditionally, the remedy for such occurrences has been to grant a defendant's request for a mistrial or, if the trial proceeds to a conviction, to reverse or vacate the conviction and order a new trial. Only in a narrowly defined category of cases, involving misconduct designed to procure a premature termination of the trial, has the Double Jeopardy Clause come into play to bar a retrial of the charges.

The decision in the instant case, if affirmed by this Court, would radically alter this traditional balance. Many, if not most, instances of prosecutorial misconduct sufficiently serious to justify a mistrial would at the same time bar any retrial. As we show below, such drastic consequences would represent a radical departure from past decisions of this Court, would substantially alter the balance of interests previously struck in double jeopardy cases between the defendant's right to avoid repetitive prosecutions and society's right to secure a resolution of criminal charges, and would create grave practical problems for judicial administration. The existing rule limiting the double jeopardy bar to prosecutorial or judicial misconduct deliberately intended to precipitate a premature termination of the trial should be retained.

2. This Court's decisions firmly establish that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request."

United States v. *DiFrancesco*, 449 U.S. 117, 130 (1980). The court below held, however, that double jeopardy principles incorporated in the Due Process Clause of the Fourteenth Amendment preclude retrial following a successful defense mistrial motion based upon prosecutorial "overreaching" even though there is no finding that the prosecution intended to prompt a mistrial request. That decision and similar decisions by several federal courts of appeals are based upon an erroneous interpretation of dictum in the plurality opinion in *United States* v. *Jorn*, 400 U.S. 470 (1971), and are in conflict with previous and subsequent opinions of this Court.

3. The interests served by the Double Jeopardy Clause are fully protected by the rule permitting retrial following a successful defense mistrial motion not deliberately provoked by the prosecution or the court. A defendant has a "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)), but that right is not absolute. Rather, it is to be weighed against the powerful societal interest in securing a determination of guilt or innocence of one against whom criminal charges have been brought. This is illustrated by the settled rule allowing retrial after reversal of a conviction on appeal or after a mistrial granted over the defendant's objection in cases of "manifest necessary." Moreover, when the defendant moves for or consents to a mistrial, he is not deprived of his "valued right." He may insist upon that right or he may forego it after weighing all the relevant factors, *e.g.*, the likely verdict of the first trier-of-fact; the chances of reversal on appeal; the effect of delay on the prosecution's case and his own, if he intends to present one; the benefits of postponing the date on which service of any sentence would have to begin; and the costs, both financial and emotional, of permitting the first trial to proceed to verdict and of undergoing a second trial.

It is sometimes argued that a prejudicial error by the prosecutor or the judge deprives the defendant of the "valued right to have his trial completed by a particular tribunal" and that the defendant who seeks a mistrial

based upon such error does not freely relinquish that right. However, that argument is based upon a fundamental misunderstanding of the nature of the defendant's right, for while the defendant has a qualified right to a single trial resulting in a final adjudication of guilt or innocence, the defendant has no right to a single errorless trial. Prejudicial error by the prosecutor or judge is one of the risks of trial. The remedy for and deterrent against such error is not dismissal of the indictment under the Double Jeopardy Clause, but the granting of a new trial. Since the prosecution and the trial judge normally have strong incentives for avoiding retrial, that deterrent is usually sufficient. However, this Court has identified a small category of cases in which the threat of mistrial does not suffice, *i.e.*, cases in which the prosecutor or the judge deliberately provokes the defense mistrial request. In those instances, reprosecution is barred, but there is no justification for expanding that narrowly drawn exception.

4. Apart from their lack of a sound theoretical foundation, the decision below and analogous federal decisions departing from the established rule seem likely to produce highly undesirable results in practice. The standards employed in those cases for determining whether reprosecution will be permitted—*e.g.*, whether the defense motion was provoked by prosecutorial or judicial "overreaching," "gross negligence," or "intentional misconduct"—provide little guidance for defendants, prosecutors, or courts. Under such standards, neither defendants, who must decide whether to seek or consent to a mistrial, nor trial judges, who must rule upon mistrial motions, are able to foretell the consequences of their decisions. That confusion is not in anyone's best interests.

Such vague standards also lead to widely divergent and occasionally unjust results, especially since most prosecutorial or judicial errors resulting in mistrials could be characterized as "overreaching" or "gross negligence." If reprosecution were barred in only a fraction of the cases involving such errors, the effect upon the

criminal justice system would be very serious. In addition, nebulous standards like "overreaching" seem likely to encourage lengthy appeals under *Abney* v. *United States*, 431 U.S. 651 (1977), whenever the trial judge allows reprosecution following a mistrial. Finally, such standards may not serve the interests of defendants, because trial judges will naturally be far more hesitant to grant defense mistrial motions if they know that retrial will not be permited or if they are uncertain about the consequences of granting the defendant's request.

ARGUMENT

A DEFENDANT MAY BE RETRIED FOLLOWING A MISTRIAL DECLARED ON HIS MOTION OR WITH HIS CONSENT UNLESS THE MOTION OR CONSENT WAS INTENTIONALLY PROVOKED BY THE PROSECUTOR OR THE JUDGE

A. The Decision Below Is Contrary To Principles Established By A Consistent Line of Decisions of This Court

Just last term, in *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980), this Court stated that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request." That rule is firmly rooted in this Court's prior decisions, whereas the decision below and other analogous decisions lack authoritative precedential support.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[1] "The constitutional provision had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *United States* v. *Scott*, 437 U.S. 82, 87 (1978). See also *United States* v. *Wilson*, 420 U.S. 332, 340 (1975).

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[1] The Double Jeopardy Clause applies to the states through the Fourteenth Amendment. *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 131 n.12; *Benton* v. *Maryland*, 395 U.S. 784 (1969).

Those pleas did not lie, however, unless a verdict of either innocence or guilt was delivered by the trier of fact or unless a pardon was granted. Thus, they had no application to cases in which the jury failed to reach a verdict. *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978); *id.* at 40-41 (Powell, J., dissenting). Indeed, the early common law refused to permit the discharge of the jury until a verdict was returned (*id.* at 36 & n.13 (majority op.), 41-42 (Powell, J., dissenting)).

Influenced by the Double Jeopardy Clause's origins in the common law pleas, the early federal decisions treated the right to discharge a jury before verdict and to retry the defendant as something apart from the question of double jeopardy. In *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), where a trial for a capital offense had ended in a mistrial due to a hung jury, Justice Story, writing for the Court, rejected the argument that the Double Jeopardy Clause applied where a verdict had not been returned. He stated (*id.* at 580):

> We are of opinion, that the facts constitute no legal bar to a future trial. *The prisoner has not been convicted or acquitted, and may again be put upon his defence.*

See also *United States* v. *Haskell*, 26 Fed. Cas. 207 (No. 15,321) (CC.E.D.Pa. 1823); J. Story, *Commentaries on the Constitution* § 1787 (1833). Justice Story then went on to hold, on nonconstitutional grounds, that courts have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, *supra*, 22 U.S. (9 Wheat.) at 580.

Eventually discussions of the power to discharge a jury and retry the defendant took on constitutional overtones (*Crist* v. *Bretz*, *supra*, 437 U.S. at 45-47 (Powell, J., dissenting)), and it became established that a defendant was placed in jeopardy even in a prosecution that did not end in a conviction or an acquittal. *Crist* v. *Bretz*,

supra, 437 U.S. at 34; *id.* at 47 (Powell, J., dissenting). See also *Wade* v. *Hunter*, *supra*, 336 U.S. at 688; *Kepner* v. *United States*, 195 U.S. 100, 128 (1904). But while a change occurred in the foundation for the rule governing retrial after a declaration of mistrial, there was no change in the principle that retrial is normally permitted following a mistrial declared with the defendant's consent.

In *United States* v. *Watson*, 28 Fed. Cas. 499, 501 (S.D.N.Y. 1868) (No. 16,651) (emphasis added), the court wrote:

> When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, *unless he consents to the discharging of the jury without giving a verdict*, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper.

The opinion in *Watson* does not rest upon the Double Jeopardy Clause, nor does its discussion of the defendant's right to have a verdict at the first trial necessarily imply that a premature unconsented termination of the first trial would bar a retrial of the charges. But by the time of the decision in *Wade* v. *Hunter*, the principles expressed in *Watson* had come to be regarded as being embodied in the Double Jeopardy Clause.

Although in intervening years the Court had not addressed the effect of the Double Jeopardy Clause when a mistrial was declared at the defendant's request or with his consent, the Court had decided that a defendant could be retried after his conviction was reversed on appeal. *United States* v. *Ball*, 163 U.S. 662, 672 (1896). See *Burks* v. *United States*, 437 U.S. 1 (1978) (retrial allowed after reversal of conviction on appeal except in cases of insufficient evidence). And all the various rationales advanced over the years to support that rule apply with equal, if not greater, force to the rule per-

mitting retrial, except in limited circumstances, after a successful defense mistrial motion. Thus, if a defendant "waives" his double jeopardy rights by taking an appeal (see *Trono* v. *United States*, 199 U.S. 521, 533 (1905)), making a mistrial motion should also constitute a "waiver." If there is one "continuing jeopardy * * * where criminal proceedings against an accused have not run their full course" (*Price* v. *Georgia*, 398 U.S. 323, 326 (1970)), that principle would apply with even greater force where the first trial terminated before verdict than where a tainted conviction was secured that had to be reversed on appeal. And, if retrial is permitted after a successful defense appeal because barring reprosecution would exact too high a price from society (*Burks* v. *United States*, *supra*, 437 U.S. at 15)), the balance tips even more heavily in favor of retrial where a mistrial is granted with the defendant's acquiescence, not only because such mistrials are far more common than reversals on appeal but also because the underlying errors are frequently much less serious.

Thus, when the Court turned its attention to the double jeopardy problem in cases where a mistrial was declared on defendant's motion or with his consent, the rule permitting retrial except in limited circumstances was virtually foreordained. In *Green* v. *United States*, 355 U.S. 184, 188 (1957), the Court stated that "a defendant is placed in jeopardy once he is put to trial before a jury *so that if the jury is discharged without his consent* he cannot be tried again." The Court added (*ibid.*):

> This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where "unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict." *Wade* v. *Hunter*, 336 U.S. 684, 688-689.

In succeeding years, the Court repeatedly made the same two points: that retrial is usually, if not invariably, permitted after a mistrial declared with the defendant's consent and that the Double Jeopardy Clause prohibits retrial when a mistrial is declared to avoid an acquittal or to harass the defendant.[2]

In *Gori* v. *United States*, 367 U.S. 364 (1961), the Court held that retrial was permitted after the trial judge declared a mistrial *sua sponte*. Applying the rule of *Perez* allowing a new trial in cases of "manifest necessity," the Court stated (367 U.S. at 369) (emphasis added):

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—*cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.*

In *Downum* v. *United States*, 372 U.S. 734 (1963), retrial was barred where the prosecutor obtained a mistrial

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[2] In this brief we are addressing a situation in which the defendant has affirmatively moved for a mistrial, and opinions addressing this subject generally speak of a defendant's motion for or consent to such action. One related issue that has arisen and remains unresolved by this Court concerns the situation in which a trial is terminated before verdict (either by mistrial or dismissal) without the defendant either moving for or objecting to such relief. The question whether silence on the defendant's part, when adequate opportunity exists to express his preference for continuation or termination, constitutes an implied consent to the termination and permits a retrial is presented in our petition in *United States* v. *Dahlstrum*, No. 81-973 (filed Nov. 23, 1981). Our references in this brief to the defendant's motion or consent should not be understood as anything more than a shorthand way of referring to circumstances in which he has failed to assert his "valued right" to have the trial proceed to verdict. As is evident from our petition in *Dahlstrum*, we are of the view that consent to a termination may properly be inferred from the defendant's failure to object to such a course of action as well as from his express request for or agreement to it.

over the defendant's objection, because a key government witness could not be located. The Court wrote (*id.* at 735-736) (emphasis added):

> From *United States* v. *Perez*, 9 Wheat. 579, decided in 1824, to *Gori* v. *United States*, 367 U.S. 364, decided in 1961, it has been agreed that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict *and without the defendant's consent.*

The Court added that retrial would not be allowed in cases involving "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" (*id.* at 736).

The following year, in *United States* v. *Tateo*, 377 U.S. 463 (1964), it was held that a defendant could be retried after the vacation of his conviction on collateral attack. The defendant, who was charged with kidnapping and other offenses, pleaded guilty to the less serious crimes during trial, after the district court judge stated that he would impose a life sentence if the defendant was convicted of kidnapping. The defendant's conviction was set aside in a proceeding under 28 U.S.C. 2255 on the ground that his plea was not voluntary, and this Court subsequently held that the Double Jeopardy Clause did not preclude reprosecution. The Court observed (377 U.S. at 467; emphasis in original): "If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him." The Court also remarked: "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain" (*id.* at 468 n.3).

This Court next addressed these problems in *United States* v. *Jorn*, 400 U.S. 470 (1971), where the district court judge had precipitously declared a mistrial *sua*

sponte. In a plurality opinion announcing the Court's judgment barring retrial, Justice Harlan wrote (*id.* at 485; emphasis added):

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. *Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.*[12]

[12] Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf. *United States* v. *Tateo, supra,* [377 U.S.] at 468 n.3 * * *.

This passage—or rather an erroneous reading of this passage—provides the basis for the decision below. The Oregon Court of Appeals justified its decision barring retrial by seizing upon the vague term "overreaching" in the *Jorn* plurality opinion (Pet. App. 15-16). A minority of the federal courts of appeals[3] have taken

[3] In recent years, four circuits have handed down decisions adhering to the rule barring reprosecution after a successful defense mistrial motion unless the motion was deliberately provoked by the prosecutor or judge. *United States* v. *Leppo,* 641 F.2d 149, 152 (3d Cir. 1981); *United States* v. *Roberts,* 640 F.2d 225, 228 (9th Cir. 1981), cert. denied, No. 80-6557 (June 15, 1981); *United States* v. *Rios,* 637 F.2d 728, 729-730 (10th Cir. 1980), cert. denied, No. 80-6336 (June 8, 1981); *United States* v. *Green,* 636 F.2d 925 (4th Cir. 1980), cert. denied, No. 80-6039 (Apr. 20, 1981). The Second Circuit also follows that rule, with the qualification that retrial might be prohibited in an extreme case if "a prosecutor's overreaching is so intentional, so unfair, and so prejudicial that the sanction of barring further prosecution is warranted." *Mitchell* v. *Smith,* 633 F.2d 1009, 1013 (2d Cir. 1980), cert. denied, No. 80-5636 (Jan. 12, 1981). The First Circuit, in rejecting a double jeopardy claim, has stated that where the defendant presses for a mistrial, retrial is forbidden "only if it can be said that the government's claimed

a similar approach. In *United States* v. *Beasley*, 479 F.2d 1124, 1126 (5th Cir.), cert. denied, 414 U.S. 924 (1973), the Fifth Circuit stated that a defense mistrial motion ordinarily removes any barriers to reprosecution but added that "[a]n exception to the waiver of the right against reprosecution exists * * * when the mistrial motion is the product of prosecutorial overreaching." Placing its own gloss on Justice Harlan's term, the court equated "overreaching" with "gross negligence or intentional misconduct" (*ibid.*).[4] In *United States* v. *Kessler*, 530 F.2d 1246, 1256 (5th Cir. 1976), the court relied on the *Beasley* dictum to bar retrial.[5]

Similarly, in *United States* v. *Martin*, 561 F.2d 135 (8th Cir. 1977), the Eighth Circuit held that a success-

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error stemmed from bad faith, an effort to harass or prejudice, or an attempt to provoke a mistrial." *United States* v. *Zozlio*, 617 F.2d 314, 315 (1st Cir. 1980). It is not clear whether or to what extent that dictum represents a departure from the settled rule.

[4] In support of its definition of "overreaching," *Beasley* cited *Wade* v. *Hunter*, 336 U.S. 684 (1949), but there is nothing in that decision even remotely on point.

[5] More recently, however, the Fifth Circuit has questioned whether the *Beasley/Kessler* test survived this Court's subsequent double jeopardy decisions. *United States* v. *Opager*, 616 F.2d 231, 236 n.13 (5th Cir. 1980). The Fifth Circuit has also modified that rule. It has required not simply prosecutorial overreaching but "bad faith prosecutorial overreaching." *Id.* at 234. See also, *e.g.*, *Baker* v. *Metcalfe*, 633 F.2d 1198, 1201 (5th Cir. 1981), cert. denied, No. 80-6340 (May 4, 1981); *United States* v. *Davis*, 589 F.2d 904, 906 (5th Cir.), cert. denied, 441 U.S. 950 (1979); *United States* v. *Crouch*, 566 F.2d 1311, 1317 (5th Cir. 1978). And it has stated the principle that the prosecutorial misconduct must be "egregious enough to warrant the serious sanction of prohibiting reprosecution." *United States* v. *Garza*, 603 F.2d 578, 580 (5th Cir. 1979). See also *United States* v. *Opager*, *supra*, 616 F.2d 237. In addition, some of the court's opinions, without acknowledging any inconsistency, invoke both the *Beasley/Kessler* test and the established rule permitting retrial unless the defense mistrial motion was deliberately provoked by the prosecution or the trial judge. *United States* v. *Bobo*, 586 F.2d 355, 364-365 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); *United States* v. *Kennedy*, 548 F.2d 608, 609 n.1 (5th Cir.), cert. denied, 434 U.S. 865 (1977).

ful defense mistrial motion had been precipitated by "prosecutorial overreaching" and that this barred retrial on double jeopardy grounds. The court failed to define the term "overreaching" except to state that it amounted to something more than "mere negligence" (*id.* at 139). See also *United States* v. *King*, 590 F.2d 253, 256 (8th Cir. 1978), cert. denied, 440 U.S. 973 (1979); *United States* v. *Weaver*, 565 F.2d 129, 133 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978). The Sixth Circuit has taken a similar position in dictum. *United States* v. *Enoch*, 650 F.2d 115, 117 (6th Cir. 1981).

The opinion below and those of the Fifth, Sixth, and Eighth Circuits suffer from the same flaws. All wrench the nebulous term "overreaching" out of context and ignore all that this Court has said before and after *Jorn* about the scope of the double jeopardy prohibition following a mistrial declared at the defendant's request. Moreover, both the opinion below and those of the Fifth, Sixth, and Eighth Circuits are guilty of a rudimentary logical error. Justice Harlan wrote in *Jorn* that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution * * *." 400 U.S. at 485. From that statement—that retrial is allowed when "overreaching" is absent—it does not follow that retrial is barred whenever "overreaching" is found. Furthermore, the footnote to that sentence—which explicates the textual statement by explaining that "reprosecution might well be barred" "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety *designed to avoid an acquittal*" (*id.* at 485 n.12; emphasis added)—makes it abundantly clear that the *Jorn* plurality did not intend to say that any conduct that might be characterized as overreaching would suffice to bar retrial. If that were what was meant by the sentence in the text of the opinion, the footnote, which states that retrial "might well" be barred if one type of serious misconduct were present, would be both superfluous and a significant understatement.

The Fifth Circuit also misread the *Jorn* plurality opinion in another respect. Justice Harlan's opinion stated

that "bad-faith conduct by judge or prosecutor" (*id.* at 485) is required (although not necessarily sufficient) to bar retrial following a successful defense mistrial motion. The Fifth Circuit cases, which hold that "gross negligence" may preclude retrial, conflict with that statement, since negligence, of whatever degree, is not usually regarded as "bad-faith conduct."

Subsequent decisions of this Court point up the defects in the opinion below. In *United States* v. *Dinitz*, 424 U.S. 600 (1976), the first case to reach this Court in which a mistrial had been declared on defendant's motion, the Court held that retrial was allowed, stating (*id.* at 611):

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," *United States* v. *Jorn*, *supra*, at 485, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum* v. *United States*, 372 U.S. at 736. See *Gori* v. *United States*, 367 U.S. at 369; *United States* v. *Jorn*, *supra*, at 489 (Stewart, J., dissenting); cf. *Wade* v. *Hunter*, 336 U.S. at 692.

Applying that standard, the Court concluded that a new trial would not offend double jeopardy in *Dinitz* because the conduct of the trial judge that precipitated the mistrial "was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for acquittal" (*ibid.*). Clearly *Dinitz* cannot be squared with cases holding that any sort of "overreaching," "intentional misconduct," or "gross negligence" may suffice to bar retrial.

The *Dinitz* holding has been reiterated and emphasized frequently in recent years. See, *e.g.*, *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 130; *United States* v. *Scott*, 437 U.S. 82, 93 (1978); *Arizona* v. *Washington*,

434 U.S. 497, 508 (1978); *Lee* v. *United States*, 432 U.S. 23, 30, 33 (1977).

In sum, this Court's opinions firmly establish that the Double Jeopardy Clause permits retrial after a mistrial is declared on the defendant's motion or with his consent unless the motion or consent was deliberately provoked by the prosecutor or the judge. The decision below and other decisions departing from that rule find no support in this Court's precedents.

B. The Rule Established In This Court's Precedents Fully Protects The Interests Served By The Double Jeopardy Clause

The Double Jeopardy Clause places limitations upon the prosecution's power to retry a defendant after a mistrial has been declared because, in the often quoted language of *Wade* v. *Hunter*, *supra*, 336 U.S. at 689, the mistrial impinges upon the defendant's "valued right to have his trial completed by a particular tribunal." See also, *e.g.*, *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 128; *Arizona* v. *Washington*, *supra*, 434 U.S. at 503; *United States* v. *Dinitz*, *supra*, 424 U.S. at 606. *Arizona* v. *Washington*, *supra*, 434 U.S. at 503-504 (footnotes omitted), explains that "this 'valued right' merits constitutional protection" because a second prosecution "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted."

However, the defendant's "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, *supra*, 336 U.S. at 689) is far from absolute. Since *United States* v. *Perez*, *supra*, it has been settled that even if a mistrial is declared over the defendant's objection or without his consent, retrial is permitted in cases of "manifest necessity." Retrial is allowed under those circumstances simply because the defendant's right "is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to

present his evidence to an impartial jury." *Arizona* v. *Washington, supra,* 434 U.S. at 505.

Different considerations obtain when the defendant himself moves for the mistrial or consents to its declaration. "[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *United States* v. *Scott, supra,* 437 U.S. at 93, quoting *United States* v. *Jorn, supra,* 400 U.S. at 485. "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. 'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.'" *United States* v. *Scott, supra,* 437 U.S. at 93-94, quoting *United States* v. *Dinitz, supra,* 424 U.S. at 609.

When the defendant seeks or acquiesces in the declaration of a mistrial, he is not deprived of the "valued right" protected by the Double Jeopardy Clause. Rather, he has been accorded the opportunity to avail himself of that right, if he chooses, after assessing all the relevant factors: *e.g.*, the likely verdict of the first trier of fact; the chances of reversal on appeal; the effect of delay upon the prosecution's case (and his own case, if he intends to present one); the benefits to be derived from postponing the day on which service of any sentence would have to begin; and the costs, both emotional and financial, of permitting the first trial to proceed to verdict or of undergoing a second trial.

Defendants who successfully seek a mistrial invariably argue, however, that in reality they had no choice at all because the error that prompted the mistrial motion was so prejudicial that continuation of the trial would have been a meaningless exercise. In many cases, that argument is factually false. Not only are mistrials frequently declared in cases in which there has been no reversible error, but "[m]any juries acquit defendants after trials in which reversible error has been commit-

ted, and many experienced trial lawyers will forego a motion for a mistrial in favor of having his case decided by the jury." *United States* v. *Tateo*, *supra*, 377 U.S. at 474 (Goldberg, J., dissenting). Even when the underlying error seriously prejudices a defendant, however, granting a defense mistrial motion is fully consistent with the values served by the Double Jeopardy Clause. As noted in *Dinitz* (424 U.S. at 608):

> [W]hen judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of anxiety, expense, and delay occasioned by multiple prosecutions.

Furthermore, the argument that a defendant's "valued right to have his trial completed by a particular tribunal" is thwarted in this situation is based upon a fundamental misunderstanding of the nature of that right. "[T]he defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn*, *supra*, 400 U.S. at 484. This proposition was effectively settled nearly a century ago when the Court held in *United States* v. *Ball*, 163 U.S. 662 (1896), that the Double Jeopardy Clause does not bar retrial following a successful defense appeal of a conviction. Thus, while a defendant has a qualified right to a single trial resulting in a final adjudication of guilt or innocence, he has no right to a single errorless trial—or even a single trial free of highly prejudicial or reversible error.

As Justice Harlan wrote in *Jorn* (400 U.S. at 479), "a criminal trial is, even in the best of circumstances,

a complicated affair to manage." Especially when a jury sits as the trier of fact, the list of things that can go wrong and can justify the granting of a defense mistrial motion is virtually endless. Before the case can reach the jury, the prosecutor must comply with complex rules of procedure and evidence, many of which are designed to safeguard the defendant's rights. In recent years, these rules have become ever more complicated, and the risks of prejudicial judicial or prosecutorial error have accordingly multiplied. Barring retrial whenever such errors occur and provide the basis for a successful defense mistrial motion "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, *supra*, 336 U.S. at 688-689. Judicial and prosecutorial errors, including those of a highly prejudicial nature, are simply among the normal risks of litigation, and the Double Jeopardy Clause was not intended to immunize defendants from such risks.

The remedy for and deterrent against most prejudicial trial errors is the declaration of a mistrial. In the vast majority of criminal cases, the prosecution's interest in a single trial resulting in a final adjudication of guilt or innocence is at least as great as the defendant's, and the threat of a mistrial (or a reversal on appeal) therefore effectively deters knowing and deliberate prosecutorial misconduct. While it is true that retrial may impose a severe financial burden on the defendant and may cause him greater emotional strain because of his larger stake in the outcome, the prosecutor too has strong incentives for avoiding a mistrial. It is hardly any secret that both federal and state prosecutorial resources are severely taxed by the massive flow of potential and actual prosecutions, and the burdens of retrials on these limited resources are manifest. Moreover, the balance of tactical advantage from retrials will usually lie with the defense. The prosecution must present evidence and prove its case beyond a reasonable doubt, whereas the defendant can simply put the prosecu-

tion to its proof. Therefore, "[d]elay is not an uncommon defense tactic" (*Barker* v. *Wingo*, 407 U.S. 514, 521 (1972)), for as time passes witnesses may die or disappear, their memories may fade, and tangible and documentary evidence may be lost (*ibid.*). Moreover, because the prosecution presents its case first and because defendants frequently choose not to offer extensive evidence on their own behalf, an aborted first trial will usually reveal far more of tactical value to the defendant than to the government.

In sum, the threat of a mistrial is normally sufficient to deter a prosecutor from improper conduct prejudicial to the defense. That threat also deters prejudicial conduct by overburdened trial judges, who rarely wish to preside over the trial of the same case more than once. That prejudicial prosecutorial and judicial errors occur despite the costs associated with mistrials is simply testimony to the complexity of the governing rules and the fallibility of prosecutors and judges.

There is, however, a small category of cases in which the threat of a mistrial is inadequate to deter prejudicial conduct by the prosecutor or judge. The cases in this category are those in which the prosecutor or judge does not wish to avoid a mistrial but deliberately seeks to provoke a successful defense mistrial request in order to terminate the first trial. The aim may be to harass the defendant through repeated prosecutions. Or the objective may be to use the mistrial "as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Illinois* v. *Somerville*, 410 U.S. 458, 469 (1973). In such cases, where the normal sanction of a mistrial is insufficient and where the misconduct is squarely aimed against the defendant's double jeopardy interest in avoiding multiple prosecutions, an additional deterrent is required. The Double Jeopardy Clause serves that function by barring reprosecution when a successful defense mistrial request is intentionally provoked by the prosecutor or the court. In all other cases, however, retrial is permitted after a mistrial is declared at the defendant's request or with his consent.

Several objections to this standard have been voiced or come to mind, but none, in our view, has merit. The court below questioned why a defendant's double jeopardy rights should depend upon the subjective intent of the prosecutor or the judge (Pet. App. 15 n.1). The answer to that question is implicit in what has already been said. In the vast majority of cases, the intent of the prosecutor or judge is irrelevant, for, as a rule, retrial is permitted after a mistrial granted on defendant's motion or with his consent. A narrow exception to that rule has been recognized to deter abusive conduct in those cases in which the normal sanction of a mistrial is insufficient. That exception is keyed to the intent of the prosecutor or judge because of the nature of the oppressive practices sought to be deterred. It would be illogical, therefore, if that narrow exception served to undermine the general rule, which makes no reference to subjective intent.

It may also be objected that the courts are unduly reluctant to find that a mistrial was intentionally provoked by a prosecutor or a fellow judge even if they suspect that to be the case. We are aware of no evidence that the established rule has had such an effect. We acknowledge that the finding required by that rule is probably not a pleasant one for courts to make, but it is not dissimilar to other determinations with which courts are frequently faced in nonjury trials. For example, in civil suits against government officials based upon allegedly unconstitutional conduct, the trier of fact must decide whether the officials had a good faith belief in the legality of their actions. *Butz* v. *Economou*, 438 U.S. 478 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). Similarly, in libel actions brought by public officials or public figures, the trier of fact must decide whether the news media acted with actual malice. See, *e.g.*, *Herbert* v. *Lando*, 441 U.S. 153, 156 (1979). There is nothing to suggest that the courts have shirked those unpleasant responsibilities, and there is no reason to believe that they will fail to find that a defense mistrial motion has been deliberatedly provoked when the facts warrant.

C. Departing From The Rule Established In This Court's Precedents Would Produce Highly Undesirable Results

The Oregon Court of Appeals held that retrial was barred in the present case because the mistrial resulted from prosecutorial "overreaching" (Pet. App. 15-16). In the federal system, decisions of the Fifth and Eighth Circuits have adopted a test similar to that employed by the Oregon Court of Appeals, with the Fifth Circuit defining "overreaching" as "gross negligence" or "intentional misconduct." [6] The Sixth Circuit has also stated in dictum that "prosecutorial overreaching" may preclude retrial.[7] Apart from failing to strike a reasoned balance between the societal interest in determining the guilt or innocence of persons charged with crimes and the individual interest in avoiding multiple prosecutions for the same offense, such departures from the settled rule are likely to lead to highly undesirable practical consequences.

The first and probably the most serious defect in standards such as "overreaching," "gross negligence," and "intentional misconduct" is their vagueness. The concept of "overreaching," for example, provides little guidance to courts called upon to determine whether a reprosecution may go forward following a successful defense mistrial motion. The literal and primary meaning of "overreaching" is reaching or going too far.[8] Thus, "overreaching" would seem to be present in every case in which a mistrial is caused by prosecutorial error, since by definition prosecutorial conduct that is sufficient prejudicial to the defendant to require a mistrial is conduct that goes too far.

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[6] See, *e.g.*, *United States* v. *Martin*, *supra*, 561 F.2d at 139; *United States* v. *Kessler*, *supra*, 530 F.2d at 1256; *United States* v. *Beasley*, *supra*, 479 F.2d at 1126.

[7] *United States* v. *Enoch*, 650 F.2d 115, 117 (6th Cir. 1981).

[8] *Webster's Third New International Dictionary* 1609 (1976); *Random House Dictionary of the English Language* 1029 (1967).

The potentially expansive scope of the term "overreaching" is confirmed by the opinion of the Oregon Court of Appeals, which provides little basis for distinguishing the prosecutorial error in this case from any other error that results in a mistrial. The court states that the prosecutor's fatal question was "intentional, at least in the sense that it appears it was made deliberately and after some thought" (Pet. App. 15), but presumably every word uttered in court by a prosecutor is uttered "deliberately." And since the fatal question was asked during redirect, rather than direct, examination and was clearly intended to circumvent a series of erroneous rulings by the trial judge, all that the court could have meant when it stated that the comment was made "after some thought" was that the prosecutor had sufficient time to formulate the question in her mind. The court also stated that the prosecution must be "charged with the knowledge that the comment * * * was certain to interfere with the trial process" (Pet. App. 15). The same could be said, however, of any statement that precipitates a mistrial unless a competent prosecutor could not reasonably have anticipated that the statement would result in a successful defense objection or motion to strike or a curative instruction by the judge, not to mention a successful defense mistrial request. Thus, the potential scope of the opinion below is immense.

The federal courts that have adopted the "overreaching" standard have been no more successful in confining it within reasonable limits. The Fifth Circuit has defined "overreaching" as "gross negligence" or "intentional misconduct,"[9] but those terms, however, are no more helpful than the term "overreaching" itself. Just as nearly every prosecutorial error resulting in a mistrial may be termed "overreaching," almost all such errors are probably the product of "negligence," at the least. Negligence means the failure to exercise due care. W. Prosser, *Handbook of the Law of Torts* 145-149 (4th

[9] See page 14 & note 4 *supra*.

ed. 1971); F. Harper & F. James, *The Law of Torts* § 16.1 (1956); *Restatement (Second) of Torts* § 282 (1965). Since mistrials caused by prosecutorial error are rarely inevitable, their occurrence almost invariably means that the prosecutor failed to exercise due care and was consequently negligent.

Requiring "gross negligence," rather than simple negligence, does not help. It has been aptly stated that "gross negligence" is ordinary negligence "with the addition of a vituperative epithet." *Wilson* v. *Brett*, 152 Eng. Rep. 737 (Exch. of Pleas 1843). In torts, from which the term was borrowed, that concept has generally been repudiated. W. Prosser, *Handbook of the Law of Torts* 182 (4th ed. 1971); F. Harper & F. James, *The Law of Torts* § 16.13 (1956). Yet the Fifth Circuit has relied upon the distinction between ordinary prosecutorial negligence and gross negligence in deciding whether to permit retrial following a successful defense mistrial motion. *United States* v. *Luttrell*, 609 F.2d 1190, 1192 (5th Cir. 1980). See also *United States* v. *Fine*, 644 F.2d 1018, 1022 (5th Cir. 1981), cert. denied, No. 81-151 (Dec. 7, 1981).

The other definition of "overreaching" provided by the Fifth Circuit—"intentional misconduct"—may appear somewhat more concrete but upon analysis is equally unsatisfactory. "Intentional misconduct" denotes behavior that the prosecutor knows is improper, and the term is apparently meant to include conduct that would not bar retrial under the rule established in this Court's cases, *i.e.*, conduct not intended to provoke a successful mistrial request. Thus, "intentional misconduct" resulting in a mistrial applies to situations in which the prosecutor engages in improper conduct knowing that his actions are wrong but mistakenly believing that the trial judge will let him get away with it. We doubt that this elaborate construct adds anything of value to the simpler rule long established in this Court's precedents.[10]

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[10] Apparently not content with the vague terms "overreaching," "gross negligence," and "intentional misconduct," the Fifth Circuit has added ambiguous refinements. Thus, later cases require not simply prosecutorial overreaching but "bad faith prosecutorial

The likely effects of vague, ill-defined standards like "overreaching," "gross negligence," and "intentional misconduct" are confusion, inconsistent and inequitable results, and delay. Such terms are so lacking in meaningful content that no litigant or judge will be able to predict with confidence what result they will produce. Thus, defense attorneys who must decide whether to move for or consent to a mistrial will be unable to foretell the probable consequences of such a course of action. Similarly, judges will not know whether granting a defense mistrial motion will make reprosecution impossible. Such confusion does not serve anyone's legitimate interest.[11]

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overreaching." See, *e.g.*, *Baker* v. *Metcalfe*, *supra*, 633 F.2d at 1201; *United States* v. *Opager*, *supra*, 616 F.2d at 234. The court has stated that "bad faith prosecutorial overreaching" requires proof of a bad motive and is consequently a "more demanding" term than mere "prosecutorial misconduct." *United States* v. *Opager*, *supra*, 616 F.2d at 236 n.13. However, the court has not explained what, if any, difference exists between "bad faith prosecutorial overreaching" and "intentional misconduct," a term previously adopted by the court and never abandoned. See, *e.g.*, *United States* v. *Fine*, *supra*, 644 F.2d at 1022; *United States* v. *Beasley*, *supra*, 479 F.2d at 1126. Moreover, despite the plain inconsistency, the court continues to include "gross negligence" within the definition of "bad faith prosecutorial overreaching." *Baker* v. *Metcalfe*, *supra*, 633 F.2d at 1201; *United States* v. *Charette*, 625 F.2d 57, 58 (5th Cir. 1980), cert. denied, 449 U.S. 961 (1980); *United States* v. *Wright*, 622 F.2d 792, 795 (5th Cir. 1980); *United States* v. *Opager*, *supra*, 616 F.2d at 234. Finally, in several cases the Fifth Circuit has resorted to the rule that retrial is barred only if the prosecutorial misconduct is "egregious enough to warrant the serious sanction of prohibiting reprosecution." *Baker* v. *Metcalfe*, *supra*, 633 F.2d at 1203; *United States* v. *Opager*, *supra*, 616 F.2d at 234; *United States* v. *Garza*, 603 F.2d 578, 580 (5th Cir. 1979). Obviously that standard provides little if any guidance to judges, defendants, or prosecutors.

[11] Other possible alternatives to the rule established in this Court's cases are similarly flawed. For example, "recklessness"—the conscious disregarding of a substantial and unjustifiable risk (see *Restatement* (*Second*) *of Torts* § 500 (1965); Model Penal Code § 2.02(2)(c) (Proposed Official Draft 1962))—may be an analytically sounder concept than "gross negligence" but poses similar

The vagueness of these standards will also lead to widely divergent and occasionally unjust results. What one court regards as mundane prosecutorial or judicial error will be viewed by another as "overreaching."

The present case illustrates the broad potential for disagreement about what constitutes "overreaching," since it is not even apparent that the prosecutor's conduct here warranted a mistrial, let alone dismissal of the indictment. The mistrial was declared because the prosecutor asked the following questions during redirect examination of Otto Ewaldsen, an expert witness called by the State to establish the value of the rug allegedly stolen by respondent (Tr. on Appeal 67):

> Q: Have you ever done business with the Kennedys?
>
> A: No, I have not.
>
> Q: Is that because he is a crook?

Precisely why the trial judge felt that a mistrial was warranted is not clear. The fact that Ewaldsen believed the defendant to be a criminal had already been brought out by *defense* counsel during cross-examination when, in an effort to show bias, he elicited the fact that Ewaldsen had previously filed an unrelated criminal complaint against the defendant. Moreover, by pursuing that line of questioning, defense counsel opened the door for redirect examination concerning Ewaldsen's reason for filing that complaint. The prosecutor attempted to question Ewaldsen on that point but, as the Oregon Court of Appeals later stated (Pet. App. 13), the trial judge improperly sustained defense objections to her questions. If permitted to answer those questions, Ewaldsen would

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problems in the present context. Since prosecutors presumably know most of the rules governing their conduct at trial, as well as the risks incurred by transgressing those rules, most misconduct resulting in mistrials could be termed reckless. Furthermore, while there is a voluminous body of precedent distinguishing between negligence and recklessness in the fields of criminal law and torts, there is nothing comparable to aid courts in drawing the line between prosecutorial negligence resulting in a mistrial, on the one hand, and prosecutorial recklessness, on the other.

have presumably testified that he had filed the complaint because he believed the defendant was guilty of criminal conduct. Prevented from eliciting that damaging testimony by permissible means, the prosecutor asked the question that resulted in the mistrial. Thus, the import of the prosecutor's fatal question—that Ewaldsen believed that respondent was a criminal—was already apparent to the jury and was a legitimate topic for redirect examination.

If the substance of the prosecutor's question did not precipitate the mistrial, the cause must have been the use of the epithet "crook." However, other courts have refused to declare mistrials or to reverse convictions despite the prosecutor's use of that same term,[12] not to mention far more inflammatory language.[13] In addition, it seems doubtful that the term "crook" would inflame, prejudice, or make a lasting impression upon a modern juror accustomed to contemporary speech.[14]

Whether a mistrial was properly declared is not, of course, the issue before this Court. But it is revealing that the prosecutor's relatively innocuous question could be termed fatal "overreaching" by the Oregon Court of Appeals. If the prosecutor's question here constituted

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[12] See, *e.g.*, *United States* v. *Alley*, No. 81-1447 (8th Cir. Oct. 20, 1981), slip op. 3; *United States* v. *Singer*, No. 80-1983 (8th Cir. Oct. 5, 1981), slip op. 15.

[13] See *United States* v. *Wolfson*, 322 F. Supp. 798, 826-827 (D.Del. 1971), aff'd, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972).

[14] Conceivably the trial judge granted the mistrial request (and improperly sustained the earlier, related defense objections) in an effort to shield the defendant from the consequences of his attorney's arguably ill-advised strategy of eliciting from Ewaldsen on cross-examination the fact that he had filed a criminal complaint against the defendant on a previous occasion. Presumably there were sound reasons for defense counsel's decision, but his strategy was likely to strike an experienced trial judge as risky and highly unconventional. If the trial judge was influenced by such considerations, it would be ironic indeed to hold that retrial is barred.

"overreaching," then, as we have said, virtually any prosecutorial or judicial error resulting in a mistrial may fall within the scope of that term. The number of cases in which mistrials are declared due to prosecutorial or judicial error is substantial. If retrials were barred in only a fraction of those cases, the effect upon the administration of justice would be considerable indeed. See *United States* v. *Jorn*, *supra*, 400 U.S. at 483-484; *United States* v. *Tateo*, *supra*, 377 U.S. at 466.

The untoward effects of vague standards such as those discussed above are compounded in the federal system by the rule permitting an appeal under 28 U.S.C. 1291 whenever a motion to dismiss an indictment on double jeopardy grounds is denied. *Abney* v. *United States*, 431 U.S. 651 (1977). Under the established rule, the critical issue—whether the mistrial motion was deliberately provoked by the prosecutor or judge—is a question of fact and, at least in the federal system, the district court's finding is binding on appeal unless "clearly erroneous." [15] Accordingly, once the district court makes its finding, the double jeopardy issue is effectively settled in most cases. Either the government or the defendant may appeal an adverse decision,[16] but the delay caused by such appeals may be minimized through summary affirmances. In addition, when the district court finds no intent to provoke a mistrial and permits reprosecution, the trial need not always be stayed pending appeal. By contrast, if retrial depended upon a mixed question of fact and law, such as "overreaching" or "gross negligence," significant delay might be inevitable, thereby undermining many of the interests that the Double Jeopardy Clause was intended to serve.

Finally, the vague and broad standards adopted by the Oregon Court of Appeals and some federal courts may not ultimately serve the best interests of defendants. Since the established rule permits retrial after a success-

[15] See, *e.g.*, *United States* v. *Green*, *supra*, 636 F.2d at 928; *Moroyoqui* v. *United States*, 570 F.2d 862, 864 (9th Cir. 1977).

[16] Appeal by the government is authorized by 18 U.S.C. 3731.

ful defense mistrial motion except in a few clearly-defined circumstances, trial judges can feel free to grant such motions whenever they suspect that the fairness of the trial has been impaired. If, on the other hand, granting a defense mistrial motion would often or ordinarily preclude further prosecution or if the trial judge were uncertain about the effect of granting such a motion, "it is at least doubtful that * * * courts would be as zealous as they now are in protecting against the effects of improprieties" at trial. *United States* v. *Tateo*, *supra*, 377 U.S. at 466. See also *United States* v. *Dinitz*, *supra*, 424 U.S. at 610 & n.12; *Gori* v. *United States*, *supra*, 367 U.S. at 369-370.

CONCLUSION

The judgment of the Oregon Court of Appeals should be reversed.

Respectfully submitted.

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